PRIVY COUNCIL REPORT

MARIA CHIA SOOK LAN v. BANK OF CHINA

[P.C. (Lord Simon of Glaisdale, Lord Morris of Borth-Y-Gest, Lord Salmon, Lord Fraser of Tullybelton & Lord Russell of Killowen) December 8, 1975]

[Privy Council Appeal Nos. 4 & 5 of 1974]

Banking — Guarantee — Allegation of misrepresentation, undue influence and duress.

Practice and Procedure — Consent order — Agreement between solicitors.

Registration of Deeds — Confirmation of deposit of title deeds — Failure to register — Whether mortgage unenforceable — Evidence Act (Cap. 5), s. 91 and Registration of Deeds Act (Cap. 281), s. 4.

These consolidated appeals were brought by *C*, a customer of *B*, against the dismissal of her appeals *ante*, p. 49 from the judgment of Tan Ah Tah J. *ante*, p. 41 dismissing her claims and counterclaims against *B*. *C* contended before the Board that Orders of Court made with the consent of her then solicitor should be set aside on three grounds rooted in alleged mistake viz:—

(a) a mistaken assumption by *C* and *B* that *B* had an effective charge on *C's* property in Cuscaden Road;

(b) that the Cuscaden Road property was effectively charged to secure an overdraft with *B* of *C's* husband, *Y*, whereas it was not because *C's* signature to the relevant Confirmation of Deposit of Title Deeds had been procured by misrepresentation made on *B's* behalf; and

(c) that *B* and *C* consented to the Order in the mistaken belief by both that it formed a part of, or step in, a wider agreement having contractual force, or alternatively, such a mistaken belief by *C* or her then solicitor induced by *B*, or that *B*, knowing of it, did nothing to disabuse *C*.

C contended that the Confirmation of Deposit of the Cuscaden Title Deeds was a memorandum of charge and, therefore, an assurance within the meaning of Registration of Deeds Act and inadmissible for non-registration, and oral evidence of the creation of a charge by the deposit was precluded under section 91 of the Evidence Act, or alternatively, that any such charge that may have existed prior to execution of Confirmation of Deposit was superseded by the Confirmation, which itself was inadmissible for non-registration. However, *C* conceded that the Confirmation of Deposit contained an enforceable agreement by *C* to execute a legal mortgage if required by *B* and the Registration of Deeds Act would not have stood in the way of such enforcement and, therefore. even if *C's* contention under the Registration of Deeds Act and the Evidence Act were correct, as to which the Board made no ruling, the mistake was one of machinery only, and not sufficient to justify setting aside the Consent Order.

C also alleged that the two Guarantees she signed in respect of *Y's* indebtedness to *B* were unenforceable by reason of innocent misrepresentation made on behalf of *B* as to one such Guarantee, and as to the second Guarantee that *B* by two of its officials extorted *C's* signature by improper pressure. *C* further argued in relation to the two Guarantees that the circumstances indicated a special relationship between herself and *B* which made it incumbent upon *B* to establish affirmatively, as to the first Guarantee, that there was no misrepresentation, and as to the other, that there was no improper pressure.

Held, dismissing the appeals: (1) as the Confirmation of Deposit of the Title Deeds contained an enforceable agreement by *C* to execute a legal mortgage if required by *B* and such agreement was not affected by non-registration, *B* could have required *C* to execute a legal mortgage so that a mistake if there was one as to the existence of a valid equitable charge was a mistake as to the machinery for the enforcement of *B's* rights only;

(2) there was no such mistake relating to the Consent Order as would justify setting it aside;

(3) *C* had failed to prove the alleged innocent misrepresentation regarding the first Guarantee:

(4) *C* had also failed to prove the alleged improper pressure in relation to the second Guarantee;

(5) there was no special relationship between *C* and *B* in the circumstances which resulted in the burden of proof lying on *B* as to the alleged misrepresentation and improper pressure.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

J.G. Le Quesne Q.C., A.J. Balcombe Q.C. and *K.E. Hilborne* for the appellant.

Michael Mustill Q.C., A.P. Godwin and *R.J.L. Thomas* for the respondents.

Lord Russell of Killowen (delivering the judgment of the Board): These appeals from the Court of Appeal in Singapore stem from two actions. In one of them the respondent Bank of China ("the Bank") sued the appellant ("Chia") upon two written guarantees signed by Chia guaranteeing payment to the Bank of moneys due to the Bank by Chia's husband ("Yo") trading as Dwidaya Trading Company: one such guarantee, dated January 12, 1962, was for an amount of M$200,000 and interest, and is referred to as P2: the other such guarantee was dated January 27, 1965, was for an amount of M$600,000 and interest, and is referred to as P3. Chia had previously on October 2, 1961 signed a similar guarantee for an amount of M$100,000, referred to as P1, and ultimately did not dispute liability thereunder.

In the other action Chia as plaintiff sought to have set aside a consent order dated September 12, 1966 made on an Originating Summons No. 185 of 1966 issued by the Bank. That order recited that it appeared that the title deeds of a property ("Cuscaden" which was owned by Chia and was the home at which she lived with Yo and their children) had been deposited with the Bank to secure an overdraft on account current in favour of Dwidaya Trading Company: declared that the Bank was entitled to be considered as a mortgagee of Cuscaden to secure the sum of $1,218,009.49 and interest thereon from June 30, 1966 at 8% per annum: ordered and adjudged the same accordingly: and further gave liberty to the Bank to sell Cuscaden and to execute as mortgagee a proper conveyance to the purchaser.

The sum of $1,218,009.49 was the sum standing in the Bank's books to the debit of Yo (in his trading name, which for brevity will not be used hereafter) on June 30 1966. It is convenient here to point out that if that consent order cannot be successful attacked, and having regard to the ultimate value of Cuscaden, it is not necessary for the Bank to rely upon P2 or P3, save to the extent that the figure in the consent order does not in fact include a further sum of $231,429 due from Yo to the Bank under two Trust Receipt documents (hereinafter referred to), which further sum had not for some reason at the time of the consent order been debited to Yo's general account.

Their Lordships first consider the attempt by Chia in her action to set aside the consent order. It is rightly contended on her behalf that a consent order is open to attack on grounds upon which a contract is so open. On this appeal three grounds were advanced: others had fallen by the wayside in the course of a compendious rejection of Chia and Yo

as untruthful witnesses: of the three certainly one was, as such a ground, advanced for the first time at the hearing of this appeal. Each of the three grounds was rooted in alleged mistake.

The first ground

It was contended that fundamental to the consent order was the mistaken assumption, common to both the Bank and Chia, that the Bank had an effective charge on Cuscaden for moneys owing by Yo to the Bank, whereas there was no such effective charge. This allegation that there was no such effective charge requires reference to a document of Confirmation of Deposit of Title Deeds dated October 2, 1961 signed by Chia, referred to as P4. P4 was a printed form, and so far as material reads as follows:

"To
Bank of China
(Incorporated in China with Limited Liability) 447
Singapore

Confirmation of Deposit of Title Deeds

I/We, the undersigned Maria Chia Sook Lan alias Tjhia Sioek Lan, of No. 28, Cuscaden Road, Singapore, hereby confirm the terms of my/our verbal agreement previously made with you under which it was arranged that the title deeds relating to the undermentioned properties which were in your possession were to be held by you as security for the payment to you on demand of all moneys then owing or which should at any time thereafter be owing from Dwidaya Trading Co., of 12, Boat Quay, Singapore, either solely or jointly with any other person or persons to you whether on balance of account or by the discount or otherwith [sic] in respect of bills of exchange promissory notes cheques or other negotiable instruments or in any manner whatsoever including interest with monthly rests at the rate of 8% p.a. commission and other banking charges and costs incurred in connection with the account.

I/We further confirm having agreed to execute in your favour on demand a legal mortgage of such properties in such form and containing such powers and provisions as you may require."

The undermentioned property was Cuscaden. Well prior to that date the title deeds had been delivered to the Bank by solicitors for Chia in circumstances left in some obscurity by the evidence. The argument against the effectiveness of any charge on Cuscaden was based upon the propositions —

(a) that P4 is a memorandum of charge and therefore an assurance by which land within Singapore is affected, and not having been registered under the Registration of Deeds Act was by section 4 thereof "not . . . admissible in any court as evidence of title to such land."

(b) that the very existence of P4 precluded evidence of a charge by deposit of title deeds with the orally expressed purpose of securing Yo's overdraft, by force of section 91 of the Evidence Act; or alternatively that any such charge that may have existed prior to its execution was wholly superseded by P4, notwithstanding the language of P4, and notwithstanding the disabilities said to be inflicted on P4 by want of registration.

In their Lordships' opinion it is not necessary to embark upon a discussion of these arguments and the answers thereto offered for the Bank: nor is it necessary to embark upon a discussion whether, if there were this alleged common mistake, it would be of the relevant character, whether one of law, private right or fact. The reason is this. It was conceded that P4 contains an enforceable agreement by Chia to execute a legal mortgage of Cuscaden to secure Yo's overdraft, and that the Registration of Deeds Act would not have stood in the way of such enforcement. Accordingly if the contentions for Chia were sound, on which their Lordships must not be taken to rule, the mistake was one of machinery and not of substance, and on that ground was not in any event such a mistake as would justify setting aside the consent order. The substance of the matter was that in any event the Bank was in a position to insist upon an effective charge on Cuscaden for Yo's indebtedness.

The second ground of attack on the consent order

Under this head it was asserted that the parties laboured under the common mistake that Cuscaden was effectively charged to secure Yo's overdraft, whereas it was not, because Chia's signature to P4 was procured by a misrepresentation by Djeng on behalf of the Bank that P4 charged Cuscaden with Yo's overdraft to a maximum of $100,000. It will be recalled that the guarantee P1 for $100,000 was signed contemporaneously with P4. Entries in the Bank's records indicate that Yo was being granted at that time overdraft facilities of $200,000, of which $100,000 was secured by guarantee and $100,000 was secured on Cuscaden. This alleged misrepresentation never found a place in Chia's original pleading nor in the copious amendments which followed from time to time. Chia gave no evidence of any such misrepresentation: indeed her evidence about P4 was that it was nothing at all to do with Yo's overdraft. Counsel for Chia sought to establish the making of such representation from the evidence of Loke (another employee of the Bank) as to what Djeng explained to Chia about P4: but Loke's evidence, which their Lordships do not propose to set out in detail, was uncertain: it was never suggested to Djeng in cross-examination that he had made such a representation: had the matter been pursued it might well have emerged that Djeng simply referred to $100,000 as being the initial charge on Cuscaden, with an indication that if overdraft facilities to Yo were extended so would be the scope of the charge, as was plainly so under P4, which Djeng said (and the judge accepted) he explained to Chia. In their Lordships' opinion the evidence is wholly insufficient to establish the suggested misrepresentation as to P4. On this point also their Lordships refrain from expressing any opinion whether the mistake alleged under this head is of a character such as can found an attack on a consent order.

It was alternatively submitted that there was in all the circumstances a relationship of confidentiality, involving reliance by China upon the Bank through its servants Loke and Djeng, which required the Bank to establish affirmatively by evidence that Chia fully understood the transaction, involving proof that there was no such misrepresentation. Their Lordships are quite unable to find from the circumstances any such situation.

The third ground of attack on the consent order

In summary it is hereunder contended that the order was consented to by the Bank and Chia in the mistaken belief by both that it formed a part of, or step

in, a wider agreement having contractual force. Alternatively it is said that if the Bank had no such mistaken belief, Chia or her solicitor Selvadurai had, and the Bank led her to that mistaken belief, or knowing of it did nothing to disabuse her. This requires a certain amount of attention to the correspondence leading up to the consent order, and to some evidence given by Selvadurai. So far as the evidence of Chia herself is concerned, it contains nothing to indicate such a mistaken belief on her part: her discredited evidence was that she never instructed Selvadurai to consent to the order at all. The evidence of the Bank officials Loke and Djeng contains nothing whatsoever to support the contention that the Bank entertained the alleged mistaken belief, or that the Bank induced or knew of such mistaken belief on the part of Chia or Selvadurai.

To understand the correspondence leading up to the consent order it is necessary to refer to another property of Chia known as Thomson Rise. This she had bought in June 1963 for about $400,000 borrowed from the Bank by increasing her overdraft. At the same time she deposited the title deeds of Thomson Rise with the Bank as further security for her own overdraft, and signed a document P5, a Confirmation of Deposit of Title Deeds in the same form as P4 but referring of course to her own indebtedness to the Bank and not that of Yo, and to Thomson Rise as the property in question. Chia had been a customer of the Bank since November 1960, it having then been arranged that she should be given overdraft facilities up to half the value of securities deposited by her with the Bank: over the subsequent years and until "confrontation" she had dealt successfully in stocks and shares on a buoyant market.

In March 1965 the Bank wrote to Chia calling in her overdraft, then $1,424,768: and to Yo calling in his, then $1,095,602. Correspondence followed, the Bank threatening legal action, Chia and Yo asking for time, and expressing optimism as to the outcome of current or pending transactions, in a pattern familiar in such cases. Ultimately on April 7, 1966 the Bank sent by registered post "final notices" requiring payment by Chia of her overdraft (then $1,442,468) and by Yo of his overdraft (then $1,193,374) and moneys due under the terms of Trust Receipts ($231,000 odd). Chia and Yo then went to a solicitor Tann and correspondence ensued between Tann and Donaldson & Burkinshaw, the solicitors for the Bank. The Bank's solicitors indicated that the Bank would proceed against Chia on her guarantees and the security of Cuscaden in respect of Yo's liabilities, and against Chia in respect of her deposited investments and Thomson Rise as security for her liabilities. Ultimately the Bank's solicitors wrote on July 21, 1966 that the Bank was proceeding to sell the investments deposited as security for Chia's overdraft and then to commence proceedings for the enforcement of its security on Thomson Rise in respect of the balance. On August 1, 1966 the Bank issued an Originating Summons for the enforcement of the charge on Cuscaden in respect of Yo's overdraft; and it was in those proceedings that the consent order now in question was made. At that stage, Tann being unwilling to conduct litigation, Chia went to other solicitors, Lee & Lee (Selvadurai). From the correspondence that follows it will be seen that on behalf of Chia an offer was being made to bring in Thomson Rise also as security for Yo's indebtedness. On October 25, 1966 the Bank issued an Originating Summons seeking an order to enforce their security against Thomson Rise in respect only of the balance of Chia's overdraft (after realisation of her deposited investments) of $458,501. Ultimately a consent order was made on those proceedings on November 10, 1966 which brought into the charge on Thomson Rise also the amounts due from Yo on overdraft and under Trust Receipts. Their Lordships understand that that consent order is or may be under challenge in other proceedings, but that question does not arise in these appeals.

The correspondence leading to the consent order in respect of Cuscaden needs to be set out *in extenso* for an understanding of the allegation that there was the mistaken belief already summarised.

On August 24, 1966 Selvadurai wrote on behalf of Chia to the Bank's solicitors as follows:

"We refer to the above Originating Summons, the hearing of which was postponed to Monday, September 5, 1966, and to the conversation the writer has had with your Mr. Dyne about an alternative security that our client offers to furnish to cover the overdrafts involved.

....

We are instructed that the Dwidaya Trading Company's overdraft stands at approximately $1,218,009.49 plus further interest at the rate of 8% per annum from June 30, 1966, and that our client's overdraft with the Bank stands at approximately $1,400,000.

We are further instructed that our client deposited with the Bank the Title Deeds relating to her property at No. 28, Cuscaden Road, Singapore to secure the said company's overdraft and the Title Deeds relating to her property at Thomson Rise together with numerous share certificates to secure her own overdraft.

It appears that the Bank has sold and realised some of the shares to the extent of $600,000 and that the remaining shares would realise another $400,000 at least.

The Thomson Rise property, we are instructed is worth about three million dollars.

As the property, the subject of your application herein, is our client's only house housing her family, our client would be obliged if the Bank would agree to proceed against our client's Thomson Rise property, which is sufficient to cover both overdrafts in place of the Cuscaden Road property.

Kindly let us have your clients' reaction to the above proposals at your earliest."

On August 25, Selvadurai wrote as follows:

"We refer to our telephone conversation of this morning (H.M. Dyne—P. Selvadurai) and would confirm that our client also offers to repay the overdrafts herein by monthly instalments of $10,000 each with larger instalments should her financial position improve with the resumption of the imminent Indonesian trade."

On September 3, 1966 the Banks' solicitors replied as follows:

"We enclose herewith a copy of a letter we have received from our clients, the contents of which we think you will find to be self-explanatory.

If your client agrees to these conditions laid down by the Bank it appears to us that the following steps be taken:—

1. Your client consents to the Bank being adjudged mortgagee of the property, the subject matter of the above mentioned Summons, and on taking out the Order which will

inter alia give our clients the right of sale, for us to confirm that subject to compliance by your client with the terms of monthly payments to be agreed, the Bank will not enforce the Order and sell the property.

2. For our clients to proceed by way of Originating Summons to apply to Court for leave to sell your client's property at Thomson Rise, and for your client to consent to the application which will be similar to the one referred to above.

We await hearing from you at your early convenience."

The enclosed letter from the Bank to its solicitors was as follows:

"With reference to your letter of August 31, 1966 and copies of two letters from Messrs. Lee & Lee, we would accept the terms of settlement offered therein subject, however, on the following conditions:

1. An Order of Court to be obtained giving us the liberty to sell No. 28 Cuscaden Road;

2. An Order of Court to be obtained giving us the liberty to sell land at Thomson Rise (Lot 882 Mukim XVIII) by public auction as soon as such Order is obtained, and proceeds to satisfy both accounts, if sufficient;

3. The amount of the monthly instalments to be paid to us is to be decided after realisation of the above property at Thomson Rise and all the shares. We cannot agree to the monthly payment of $10,000 as interest payable on both overdrafts accounts amounts to more than $16,000 per month at present excluding accrued interest payable under Trust Receipts the unpaid bills under which totalling $231,429. Besides there is still an amount of $132,159.28 owing us under AB bills.

We will withhold selling No. 28, Cuscaden Road so long as the monthly instalments as determined by 3 above are regularly paid to us."

Selvadurai replied on September 6, as follows:

".....

Our client agrees to conditions 2 and 3 stated in your clients' letter to you dated September 2, 1966, as exhibited in your letter under reply.

But with regard to No. 28, Cuscaden Road, our client would be grateful if the *status quo* could be preserved as she is certain that the Thomson Rise property together with the shares would be more than sufficient to cover both overdrafts.

Our client feels that this arrangement should be satisfactory to your clients, as your clients already hold the title deeds to No. 28, Cuscaden Road anyway."

The Bank's solicitors replied on September 9, 1966 as follows:

"We have now taken our clients' instructions with reference the contents of your letter dated September 6, 1966, and are instructed to inform you that our clients adhere to the original terms and conditions more particularly set out in their letter of September 2, 1966.

We must therefore inform you that at the hearing of the adjourned application on Monday September 12 we shall ask for an Order of Court in terms of the said application.

You will no doubt bear in mind the ultimate paragraph of our clients' letter of September 2, 1966 and advise your client accordingly."

To complete the relevant material the note of Selvadurai's evidence contains this passage:

"The agreement was to leave the amount of monthly instalments to be agreed upon in the future. If the Bank demanded a large sum which appeared to be unreasonable it would be left to the court to decide.

There was this concluded agreement between the Bank and Defendant. I don't agree I would be asking the Court to conclude an unconcluded agreement. At p. 11 of AB5 Messrs. Donaldson & Burkinshaw [the bank's Solicitors] treated it as a concluded agreement."

Page 11 of AB5 is the letter dated September 3 already quoted.

Selvadurai accordingly thought that the correspondence included an enforceable provision for the decision of the amount of the instalments by which the joint indebtedness of Chia and Yo should be progressively reduced when it was ascertained how much was still owing after the Thomson's Rise property had been sold, because he thought that if there was dispute on the amount and frequency of the instalments a court, on application, would settle the dispute by deciding what was in the circumstances reasonable. Their Lordships are of opinion that in this Selvadurai was in error: it would not be a problem appropriate for resolution by a court. As has been pointed out there is no evidence that Chia laboured under any such error: but even if the error of Salvedurai is to be regarded as the error of Chia, there still remains the question whether the error was shared by the Bank. There was no evidence of any error in the mind of the officials of the Bank: nor was it suggested to them in cross-examination: nor in their Lordships' opinion can any be inferred from the language of the correspondence quoted. Chia was in a situation in which she had Selvadurai and the Bank all thought that she was defenceless in law: in such a situation it is not surprising that the Bank should intend to retain freedom of action as to future requirements for reducing indebtedness. Further, in their Lordships' opinion the correspondence quoted cannot serve as a basis for concluding that the Bank in any way misled Chia (or Selvalurai) into thinking that any such instalments were otherwise than at large, nor that the Bank realised that there was any relevant mis-apprehension on the other side but kept silent.

On this aspect of the case also, the fact that their Lordships have considered the evidence is not to be taken as an expression of opinion that the mistake alleged is of a character such as, if proved, would justify the setting aside of the consent order.

Accordingly in their Lordships' opinion the attack on the Cuscaden consent order fails.

There are next for consideration, in the Bank's action, the guarantees signed by Chia in respect of Yo's indebtedness, namely P2 for $200,000 and interest, and P3 for $600,000 and interest, on which the Bank sued. As has been remarked the ultimate value of Cuscaden proved such that these guarantees became of academic interest, granted the validity of the Cuscaden consent order, except in relation to the sum of $231,429 due to the Bank from Yo in respect of two Trust Receipts, which admittedly came within P2 and P3 on their true construction but was not included in the figure of $1,218.009 in the declaration of charge in the Cuscaden consent order.

P2 was dated January 12, 1962. It is headed "Letter of Guarantee" and is addressed to the Bank. Relevant extracts are as follows:

"I/We hereby request you to accept Trust Receipts at the request of Madam Chia Sook Lan, 28, Cuscaden Road, Singapore on behalf of M/s. Dwidaya Trading Co., 33, Bank of China Building, Singapore for any sum or sums not exceeding Malayan Dollars two hundred thousand only at any

one time, (hereinafter called 'the customer'), and in consideration thereof I/we do jointly and severally agree with and guarantee you as follows, that is to say:—

1. I/We will pay to you on demand in writing all money which now is or may during the operation of this agreement be owing to you from the customer or remain unpaid on the general balance of the customer's account with you including advances, overdrafts, discounts, bills or notes held by you on or in respect of which the customer may be or have been liable to you or commission and other ordinary banking expenses interest at the rate of twelve per cent per annum or such lower rate as may be from time to time agreed between the customer and you or allowed by you with monthly rests although the relation of banker and customer may have ceased and all costs, charges and expenses which you may incur in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the money hereby guaranteed.

I/We will pay to you on demand all moneys due to you under any Bank Credit including Documentary Letters of Credit and Authorities to Purchase Acceptances Letters of Hypothecation Packing Loans to finance the purchase manufacture processing and export of goods and other commodities, in accordance with the terms and conditions in any Application Agreement or Letter signed amended extended or renewed from time to time and without notice to me/us by the customer or his authorised representative in your favour.

....

4. This Guarantee shall be a continuing guarantee to the extent of Dollars Two Hundred Thousand only (Malayan Currency) ($200,000) and interest thereon at the current rate of interest per $100 per mensem when the amount owing to you from the customer or remaining unpaid as set out in the first paragraph hereof exceeds Dollars Two Hundred Thousand only (Malayan Currency) ($200,000) for the purpose of securing not merely an equivalent amount (but subject always to the said limit of Dollars Two Hundred Thousand only (Malayan Currency) ($200,000) and the said interest thereon) the whole of the moneys or general balance in the first paragraph hereof mentioned notwithstanding any such payments receipts or dividends as are hereinbefore mentioned with interest on the sum claimable from me/us at the current rate of interest per $100 per mensem from the date of my/our receiving demand for payment thereof from which date you may at your discretion refuse further credit to the customer and close his account."

A short explanation of the nature of a Trust Receipt should be given. It is a receipt for goods imported by Yo paid for by the Bank, which goods are released to Yo by the Bank on trust for the Bank but with liberty to Yo to sell the goods for the Bank's account, Yo agreeing by the document to hand the proceeds as soon as received to the Bank. The two Trust Receipts outstanding in respect of which Yo had failed to account to the Bank were dated respectively October 16, 1963 ($213,429) and October 16, 1963 ($18,000).

As to P2 it is asserted that the Bank through Djeng innocently mis-represented to Chia that P2 was only a guarantee up to $200,000 for money due from Yo under Trust Receipts, whereas it is in terms a guarantee of sums due to the Bank on general account or otherwise: at the date of its execution Yo was under no liability in respect of Trust Receipts but was overdrawn on general account by $269,000, so that Chia by P2 undertook an immediate liability for $169,000 additional to her existing liability for $100,000 under her P1 guarantee. This alleged misrepresentation was not pleaded, nor was any evidence given by Chia in support of it: indeed her (discredited) evidence about P2 was quite different. Reliance was placed solely upon the notes of Djeng's evidence, which are certainly capable of the interpretation that he told Chia that P2 was to cover only moneys due in respect of Trust Receipts. But if the matter had been pleaded and pursued it might well have emerged that in truth Djeng's reference to Trust Receipts was a reference merely to the occasion for requiring a further general guarantee, as indeed P2 shows that it was: and in this connection it is not without interest to observe that the Bank in its pleading refers to P2 as a Letter of Guarantee "in respect of the acceptance... of Trust Receipts." In their Lordship's opinion it would be quite wrong to find that the evidence satisfactorily establishes the innocent misrepresentation asserted, and P2 is valid according to its tenor. (There is not lacking an element of paradox in the fact that the Bank need rely upon P2 only in respect of Trust Receipt indebtedness.)

As to P3 a quite different attack is made, namely that the Bank by its officials Loke and Djeng extorted it from Chia by improper pressure such that equity will regard as ground for setting the transaction aside. P3 is a further letter of guarantee in general form of Yo's indebtedness with a limit of $600,000, dated January 27, 1965. At that stage Yo's overdraft was over $1,000,000: and Chia by the indulgence of the Bank had been allowed to maintain an overdraft very greatly in excess of the limits originally agreed, an excess no doubt in part due to a decline in stock exchange values. There is no substantial difference between the versions of Chia, Loke and Djeng as to what passed at the interview at the Bank at which Chia signed P3. (Yo was not present, though Loke and Djeng when they gave evidence erroneously thought he had been: the absence of Yo can scarcely be regarded as a relevant factor in favour of Chia's case, having regard to the fact that, at least originally, on some aspects of these disputes it was asserted by Chia that the Bank had exercised undue influence *through* Yo.) When asked to give the P3 guarantee Chia was reluctant to do so: she was shown the extent of Yo's overdraft which appeared to surprise her: she was told by the Bank officials that if she did not give this guarantee the Bank would take legal action and make Yo bankrupt, and also would sell her mortgaged shares to recover or reduce her overdraft. The interview lasted up to half an hour, though Chia sought to bolster her case by saying it was three hours. Their Lordships are unable to accept that these indications of the courses of action that the Bank would take unless P3 was signed amount to the kind of improper pressure that requires a Court of Equity to set aside the transaction, whether those indications be taken separately or together. It is of course true that husband and wife are in law quite separate customers of a Bank and cannot in law be treated as one customer. But the whole history of this case presents a picture of Yo and Chia *vis-a-vis* the Bank as a family unit. It is moreover to be borne in mind that Chia's property Cuscaden — which in the view of Loke was at that time worth $800,000 and of Djeng $800,000 to $1,000,000 — was already charged with Yo's overdraft liability. Their Lordships do not regard it as relevant improper pressure in the circumstances for the Bank to indicate that it would be unable to continue an indulgence in her favour on her account, and that it

would call in Yo's overdraft on his account with the outcome of his bankruptcy, an outcome which scarcely needed express mention. The Lordships accordingly reject the attack on P3.

It was additionally contended for Chia, in relation to both P2 and P3, that all the circumstances of the case indicate a special relationship between the Bank and Chia which made it incumbent upon the Bank to establish affirmatively in the one case that there was no misrepresentation and in the other that there was no improper pressure. Their Lordships have already rejected the suggestion of such special relationship.

For these reasons their Lordships are of opinion that in each of these two actions the appeal fails and must be dismissed with costs.

Appeals dismissed.

Solicitors: *Charles Russell & Co.; Parker, Garrett & Co.*

SINGAPORE REPORTS

TOBACCO IMPORTERS AND MANUFACTURERS SDN. BHD. v. REGISTRAR OF TRADE MARKS, SINGAPORE

[C.A. (Wee Chong Jin C.J., Chua and Choor Singh JJ). April 1, 1976]
[Singapore — Civil Appeal No. 40 of 1975]

Trade Marks — Application for registration of trade mark — Carton cut-out — Application rejected by Registrar — Mark not distinctive as it is highly descriptive of character and quality of the goods — Application to register in Part B also refused — Trade Marks Act (Cap. 206), s. 10.

The appellants had applied for registration of a trade mark in respect of cigarettes. The mark consisted of a carton cut-out from a white cigarette packet at the centre of which are the words "Virginia Gold" in bold capitals within a red rectangle at the bottom of which is a device of two tobacco leaves in gold. The Registrar of Trade Marks refused the application for registration. He also refused the application in respect of Part B of the register on the ground that the mark was not capable of distinguishing the goods of the appellants. An appeal to the High Court was dismissed (*ante*, p. 8). The appellants thereupon appealed to the Court of Appeal.

Held, dismissing the appeal: (1) on the evidence it had not been shown that the Registrar of Trade Marks and the High Court were wrong in coming to the conclusion that the appellants' mark looked at as a whole was not distinctive and therefore the application for registration in Part A of the register was correctly refused;

(2) notwithstanding proof of distinctiveness in fact arising from the evidence of 7 years' user, it was open to the Registrar of Trade Marks and the High Court to consider whether the mark was capable of distinguishing the appellants' goods so as to qualify for Part B registration;

(3) in this case both the Registrar of Trade Marks and the High Court had decided that the appellants' mark was not capable of distinguishing the appellant's goods in spite of the accepted fact of 7 years' user and there was no evidence to show that they were wrong.

Cases referred to:-

(1) *British American Tobacco Co. Ltd.* v. *Tobacco Importers and Manufacturers Ltd.* [1963] M.L.J. 196.
(2) *Re Joseph Crosfield & Sons Ltd.* [1910] 1 Ch. 130, 145.
(3) *In re Liverpool Electric Cable Company Ltd.* 46 R.P.C. 100, 118.

COURT OF APPEAL.

T. H. A. Potts and *S. Murugasu (Miss)* for the appellants.

Sally Ang (Dy. Registrar) for the respondent.

Wee Chong Jin C.J. (delivering the judgment of the Court): In June 1969 Tobacco Importers and Manufacturers Sendirian Berhad (hereinafter referred to as "the appellants") applied for registration of a trade mark in Class 34 in respect of cigarettes. The mark consists of a carton cut-out from a white cigarette packet at the centre of which are the words "VIRGINIA GOLD" in bold capitals in white within a red rectangle at the bottom of which is a device of two tobacco leaves in gold.

The Registrar of Trade Marks (hereinafter referred to as "the Registrar") raised objections to its registration on the following grounds: —

(a) *Under section 10 of the Trade Marks Act (hereinafter referred to as "the Act")*
  (i) The words "Virginia Gold" are not invented words.
  (ii) The words "Virginia Gold" are descriptive of the goods.